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A Critique of the Proposed New Admission Rule for District Courts in the Second Circuit

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The proposed new admission rules for the federal district courts in the Second Circuit will have seriously adverse effects on law schools and law students. There are better ways to work toward achievement of the goal of the best possible representation of clients. The effort should be nationwide, by examination, and with the bar sharing some of the costs.

THE EFFORTS of the Second Circuit's advisory committee on qualifications to practice in the federal courts and of the Association of American Law Schools are directed toward a common goal: Training lawyers to provide the best possible representation of their clients. The question is how best to achieve that goal.

The committee—popularly known as the Clare Committee after its chairman, Robert L. Clare, Jr., of New York City—has proposed a set of rules that would impose a number of new requirements for admission to practice in the federal district courts of the Second Circuit. A summary of the committee's report is contained in the article, "New Admission Rules Proposed for Federal District Courts," which appeared in the August issue of this *Journal,* page 945. One requirement in those rules causes serious concern to the Association of American Law Schools—the requirement that applicants have completed courses in five related areas —evidence, civil procedure, criminal law and procedure, professional responsibility, and trial advocacy.

These comments on that requirement are designed to serve three purposes—first, to indicate what the A.A.L.S. sees as some of the consequences of the proposed rule; second, to set forth our concerns about those consequences; and third, to propose an approach that would alleviate many of those concerns.

Course Requirements May Proliferate

What would be the consequences of the proposed course requirement? It does not directly obligate any law school to offer any particular course and it does allow applicants for admission to the bar the option of securing credits for the courses by way of continuing legal education programs. Nonetheless, there are few prudent and informed students who do not want to qualify themselves for admission to practice in the Second Circuit, whether on graduation or at some later time in their careers. Therefore, they will press their law schools to provide the courses in sufficient quantities that all students wishing to take them will have that opportunity.

Some might think this is a minor problem for the A.A.L.S., most of whose member schools are located outside the Second Circuit. But the reality is that large numbers of students in A.A.L.S. schools come from states in the Second Circuit and a large number go to those states to practice.

The problem will be substantially more complicated if other jurisdictions—state and federal—adopt other admission requirements. The Supreme Court of Indiana already has promulgated rules concerning courses to be taken in law school, and those rules are quite different from the ones proposed by the Clare Committee. We fear that other jurisdictions will follow suit if the rules proposed by the committee go into effect.

I have talked informally with federal judges in other circuits about this. I asked whether, assuming that the Second Circuit adopts a rule along the lines proposed, other circuits will adopt a similar rule. The general response—although I did not conduct a systematic canvass—was that if the Second Circuit adopts its own rules, other circuits may adopt their own rules. Some may be consistent with those of the Second Circuit; others may be inconsistent. Since the Second Circuit did not consult the other circuits, these judges indicated, the other circuits will be under no obligation to follow the Second Circuit. The result, in short, could be a maze of conflicting course requirements.

Unhappy Prospect of Conflict and Inconsistency

This unhappy prospect leads directly to our second point— the concerns of the Association of American Law Schools about the proposed rules. The most important concern is the problem of conflict and inconsistency. Most students come to law school with no certain sense of where they want to practice and with no guarantee that they can go where they may wish to go. These students are vital national resources, and it is essential, we believe, that they have an opportunity to practice in the jurisdiction where they believe their talents will be best utilized. Yet, if they face a variety of inconsistent course requirements, they may be forced to make their career choices much earlier than is either educationally sound

THIS article was adapted by its author, Thomas Ehrlich, dean of the Stanford Law School, from a statement he made to the Advisory Committee to the Judicial Council on Qualifications to Practice before the United States Courts in the Second Circuit, popularly known as the Clare Committee. Dean Ehrlich appeared before the committee on behalf of the Association of American Law Schools, an organization of 132 law schools located throughout the country. He is chairman of a special committee of the A.A.L.S. to study proposed new standards for admission to practice and to represent the association in hearings on the proposals. The A.A.L.S. committee includes deans from the University of Chicago, Harvard, and Yale law schools, and professors of law from the universities of Iowa, Michigan, and Virginia.

or allocatively wise from the standpoint of the nation's bar. Some students best suited for practice in New York City, for example, may go elsewhere because they are unable to take the specific courses required for admission.

We do not suggest that it makes no difference which courses a student takes. The subject matter of law school courses does make a difference—an important one. But care must be taken not to hobble curricular innovation and variety. In this situation, we urge particular care. If any circuit in the federal system is a "national circuit," it is the Second. It attracts new lawyers from all over the country; that is one of its great strengths. What the Second Circuit does, therefore, will have a profound impact on the curricula of law schools throughout the country.

In a society that has become acutely conscious of the requirement that employment criteria be "job related," it is obviously important that this standard be applied with special care when the legal profession is dealing with itself. In our view, one may properly question whether at least some of the courses included in the proposed rule are sufficiently "job related" to meet that burden for at least some lawyers practicing in the district courts of the Second Circuit. Criminal procedure for one planning to do antitrust work for a large Wall Street firm is one example. We do not suggest that the course in criminal procedure would be of no benefit to that lawyer, but we do suggest that the benefits may be outweighed by the substantial cost. We know of no studies showing correlations between success as a trial lawyer—however measured—and courses taken in law school. Those correlations may exist, but we urge that they be established before particular courses are required for admission.

Costs Will Be High

What are the costs of the proposed rule? One is the expense to law schools of providing first-rate instruction. To take the field of trial advocacy, my own faculty at Stanford believes that the subject can be best taught in relatively small groups, through so-called clinical instruction. This is extremely costly education and the resulting burden is particularly troublesome at a time when law school budgets are being cut across the country. To impose on the law schools the obligation of providing an enormously expensive program for large numbers of students—or, alternatively, a second-rate program—seems to us unfair and unwise.

There are additional costs to students since they must choose a limited number of courses from among those offered. Students wanting to prepare themselves for the opportunity to practice in the Second Circuit will feel forced to take the five required courses, although their career interests are, for example, in taxation, commercial law, and corporate practice. The proposed rule, therefore, would interfere with preparation for practice in those challenging fields.

A closely related point concerns the independence of legal education. Law schools are research centers as well as law training centers, and they have a variety of obligations to the bar and to society generally. There is certainly room for improvement in discharging those obligations. But we have serious concerns that the work of the law schools will be threatened if their curricula are structured too narrowly by outside influences.

Administering the rules also will create problems. If a course in civil procedure includes professional responsibility, is the rule satisfied? How much criminal law is needed? Will the committee on admissions specify the answers? Will it specify how much federal jurisdiction must be taught and from what textbook? Apart from other concerns, these questions will produce an administrative nightmare, not only for the law schools that must try to interpret the rules, but for the circuit itself.

Another serious problem is that the quality of courses in the required subjects varies widely among law schools. The variation is particularly noticeable in clinical courses such as trial advocacy. Without a substantial outlay of resources, some of those courses will be worthless, for to teach the area well—at least in a clinical context—is extremely expensive, far more so than many law schools can afford.

There Are Better Alternatives

What then do we propose as an alternative to the Clare Committee's approach? First, it seems to us essential that any effort to deal with this problem be made on a nationwide rather than a circuit-by-circuit basis. A step in this direction has already been taken by the National Conference of Bar Examiners, which has proposed a national bar examination for admission to practice in all federal courts. Some might go further and suggest that the effort not be limited to the federal courts but include the state court systems as well. In all events, we are convinced that only through a nationwide, co-ordinated approach can the problems of conflicts and inconsistencies be avoided.

Second, it seems to us appropriate that the bar assume

some responsibility for meeting the increased costs of whatever additional programs are undertaken. In our view, that responsibility should include two parts. One part is a study of the qualities of advocacy that are desired for trial court practice and of the extent to which those qualities relate to specific course work or other dimensions of legal education. The other part is to underwrite, or at least join in underwriting, the cost of courses and programs that are established as prerequisites for admission to practice.

Third, we suggest that examination, the traditional means, is a better approach to the problem of improving the quality of trial advocacy than required courses. In the main, we gather it is lawyering skills rather than substantive knowledge that needs improvement. Many law schools are not well equipped to provide training in those skills, particularly in comparison to the practicing bar. Quality control is certainly more feasible through examinations for competence than by monitoring law school courses throughout the country.

Students Wonder: Why Burden Us?

Let me raise a final point from the perspective of many law students, and try to do so in a way that will not be misunderstood. I have talked to a number of students—not just students at my own school—and almost uniformly they express the view that if the quality of lawyering in the Second Circuit is inadequate today, then today's lawyers should be required to participate in remedial education, as well as their successors—today's law students. These students suggest that it is unfair to burden them with new sets of requirements when current practitioners do not have to meet those requirements.

Over the next few years the number of lawyers in the Second Circuit and throughout the country will increase rapidly. Without meaning any disrespect, many students view the proposed rule as limiting competition, although they realize that this is not the committee's motive.

A number of students with whom I have talked also have raised concerns about the suggested option of taking Practising Law Institute courses in the required subjects. These students say they do not plan to practice in New York City or other major urban areas but rather in rural areas far removed from these centers. To these students, therefore, the option of a Practising Law Institute course is quite unrealistic.

The proposed rule is, of course, designed to protect the public, not the prospective lawyers. Nonetheless, prospective lawyers—our current law students—deserve attention lest they come to view the bar with unwarranted cynicism. Adequate representation of clients is a matter of concern to the Association of American Law Schools. We urge, however, that there are better approaches to the problem than requiring students to take specified courses in law school—approaches that bear less heavily on law students and law schools and that are more likely to accomplish the common goal of improving the quality of lawyering in the Second Circuit and throughout the country. ▲

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